IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	
Plaintiff,	)	
vs.	)	C.A. No. 00-2041
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual,	)	
Defendants	)	

RESPONSE TO PETITION OF PLAINTIFF, WRS, INC.,
FOR SUPPLEMENTAL RELIEF IN AID OF EXECUTION

AND NOW, comes Defendant John Herklotz, by and through his attorneys, Burns, White & Hickton, LLC, and files this Response to Petition of Plaintiff, WRS, Inc. for Supplemental Relief in Aid of Execution of its Judgment Against John C. Herklotz Pursuant to F.R.C.P. 69 And Pa. R.C.P. 3118 (Document 162)[1] , of which the following is a statement:

A. Introduction

1. Plaintiff's Petition should be denied for the following reasons:

a. The issue of security in lieu of a supersedeas bond was the subject of ongoing discussions between counsel for Plaintiff WRS and counsel for Defendant John Herklotz ("Herklotz") and those discussions did not reach an impasse.

[1] Plaintiff's Petition was denominated as a Motion on the docket.

b. Prior to the filing of WRS's Petition, there were documents and motions placed on the record, either personally or through counsel, by Defendants Eric Parkinson and Charles von Bernuth. In fact, there have been multiple filings by Defendant Charles von Bernuth subsequent to the filing of the Petition that is the subject of this Response. In significant part, the documents placed on the record by Defendants Eric Parkinson and Charles von Bernuth raise serious questions as to whether the summary judgment orders entered against Defendant John Herklotz are appropriate.

B. Discussions Regarding Security in lieu of Appeal Bond

2. Pursuant to and as a part of the discussions referenced in paragraph 1. a., above, on Wednesday, August 8, 2007, counsel for Herklotz sent counsel for WRS an electronic mail message, a copy of which is attached to this Response as Exhibit "A."[2]

3. The attachment to the electronic mail message referenced above was a proposed Stipulation Pursuant to F.R.C.P. 62(D) for an Order Staying Proceedings to Enforce Judgment Pending Appeal. The initial form of the document was drafted by counsel for WRS and subsequently modified by counsel for Herklotz pursuant to ongoing discussions, negotiations, and exchange of information.

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[2] Although the electronic mail message indicates that the attached document was a "Stipulation to Enforce Judgment," the actual electronic document was entitled Stipulation Pursuant to F.R.C.P. 62(D) For An Order **Staying** Proceedings To Enforce Judgment Pending Appeal." (Emphasis added.) (*See* first page of document, attached as second page of Exhibit "A.")

4. It was the understanding of counsel for Herklotz that counsel for WRS would either: a) Revise the document further and return it for comment, or, b) Pursuant to an oral agreement between counsel, indicate that WRS was not interested in further negotiations and impose a deadline for further action by Herklotz, which may have included filing an appeal bond or a request that the negotiations regarding security for the appeal be continued. Instead, counsel for WRS filed the subject Petition.

5. The filing of the Petition was a material breach of the agreement between counsel for WRS and counsel for Herklotz. As such, in the event that WRS does not voluntarily withdraw the Petition, it should be denied.

C. Filings by Defendants Eric Parkinson and Charles von Bernuth

6. Paragraphs 1 through 5 of this Response are incorporated herein by reference.

7. On June 5, 2007, a document sent to the Court by Eric Parkinson, purporting to be acting on behalf of Defendant Plaza Entertainment, was placed on the record (Document 148).[3] Among other statements, Mr. Parkinson indicated that he is apparently in possession of Plaza Entertainment's accounting records and that he "can prove that WRS actually owes a significant amount of money to Plaza Entertainment, Inc."

[3] The document is denominated as a "Memorandum," but it was entered on the docket as a "Letter."

8. With respect to the summary judgment as to damages entered against Defendant Herklotz on February 20, 2007 (Document 139), there were multiple issues regarding the nature and status of Plaza's account. By way of further example and without intending to set forth all of Mr. Parkinson's statements, Mr. Parkinson also indicates that WRS "arbitrarily replicated additional videos without the consent of WRS." Finally, Mr. Parkinson indicates that he did not have notice of the proceedings that culminated in the entry of a default judgment against him on February 20, 2007 (Documents 140 and 141).

9. The statements made by Mr. Parkinson are relevant and material to Defendant Herklotz' liability under the suretyship agreement that is the focus of the complaint counts that WRS filed against Mr. Herklotz.

10. Defendant Charles von Bernuth has filed a series of documents, including a Motion to Reopen Case Pursuant to Rule 60 (Document 150) and a number of supplements, affidavits, and briefs in support. Procedurally, Mr. von Bernuth also indicates that he did not have proper notice of the proceedings that culminated in the entry of a default judgment against him on February 20, 2007 (Documents 140 and 141). Substantively, Mr. von Bernuth has raised multiple issues with respect to his personal liability, and the liability of Defendant Plaza, to WRS, including matters regarding a counterclaim that was filed against WRS. (*See* Documents 150, 151, 152, 153, 154, 155, 156, 163, 164, 165, 166, 167, 169, 172, 174, and 176).

11. In addition to the filings in this Court, Defendants Parkinson, von Bernuth, and Plaza have participated in the appeal that was filed by Defendant

Herklotz in the United States Court of Appeals for the Third Circuit. (*See* copy of Court of Appeals docket entries as of January 12, 2008, appended hereto as Exhibit "B.") Although their participation in the appeal was challenged by WRS, the Court of Appeals, in an order entered on September 9, 2007, allowed Plaza, Parkinson, and von Bernuth to participate in the appellate proceedings due to their involvement as parties in the case before this Court.

12. On December 11, 2007, the Court of Appeals granted Mr. von Bernuth's motion to stay the proceedings in the Court of Appeals until this Court either rules on or reconsiders Mr. von Bernuth's motion under Rule 60(b) (Document 150). In addition, on December 19, 2007, this Court entered an order giving Mr. Parkinson the opportunity, until January 25, 2008, to file an appropriate motion if he desires to challenge the default judgment entered against him.

13. As this Court is aware, Defendant Herklotz filed cross-claims against Defendants Parkinson, von Bernuth, and Plaza. In addition, Mr. Herklotz can be liable to WRS in his role as a surety only to the extent that WRS proves liability with respect to its claims against Plaza. Such liability is being aggressively challenged by Mr. von Bernuth and Mr. Parkinson has placed on the record a number of significant allegations that, if proven, would purport to establish that Plaza is not liable to WRS for any amount of money on the obligations that underlie Mr. Herklotz' obligation. Under the circumstances presented above, it would be manifestly unfair and unjust for WRS to commence execution proceedings against Mr. Herklotz.

WHEREFORE, Defendant John Herklotz respectfully requests that the Petition of Plaintiff, WRS, Inc., for Supplemental Relief in Aid of Execution of its Judgment against John C. Herklotz Pursuant to F.R.C.P. 69 And Pa. R.C.P. 3118 be denied.

Respectfully submitted,

Burns, White & Hickton, LLC

By: *John P. Sieminski*
John P. Sieminski
Pa. ID #58991

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **RESPONSE TO PETITION OF PLAINTIFF, WRS, INC., FOR SUPPLEMENTAL RELIEF IN AID OF EXECUTION** has been served on counsel listed below by electronic mail on this 15th day of January, 2008:

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Mr. Eric Parkinson
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(via U.S. mail)

BURNS, WHITE & HICKTON, LLC

By: *John P. Sieminski*
John P. Sieminski, Esquire
Attorneys for Defendant, John Herklotz